

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



75 4214

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 75-4214

CHARLES G. RODMAN, as Trustee of the  
ESTATE OF W. T. GRANT COMPANY, Bankrupt,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON APPEAL FROM A DECISION OF THE UNITED STATES  
TAX COURT

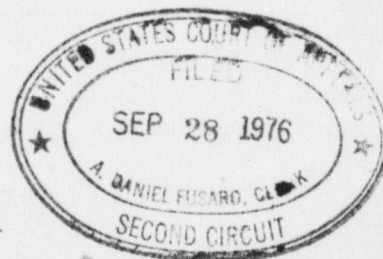
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ON APPEAL FROM A DECISION OF THE UNITED STATES  
TAX COURT

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BRIEF FOR THE APPELLANT

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Preliminary Statement

The taxpayer, W. T. Grant Company ("Grant"), during the taxable years before the Court (ended January 31, 1964 and 1965) and thereafter until adjudged a bankrupt on April 13, 1976, sold variety goods in more than 1000 stores throughout the United States. Grant used several customer credit plans. In issue is Grant's coupon book installment plan (the "Grant Plan"). Under it, the customer acquired a book of coupons, immediately redeemable for merchandise, agreeing to pay for the book in equal monthly installments over a fixed period of time. The customer's payments totaled the redemption value of the coupons plus a pre-determined finance charge (e.g., for \$100 of coupons, payment of \$10 per

month for eleven months). In question in this proceeding is the proper federal income tax reporting by Grant of merchandise sold in exchange for coupons. The Trustee in bankruptcy, as successor to Grant, claims that a percentage of sales under the Grant Plan was properly reportable on the installment method of tax accounting. The Commissioner of Internal Revenue claims that all of these sales were fully reportable in income when made, although customer payment was deferred until later years or was not received by Grant at all.

#### Issues Presented

One substantive issue and one procedural issue are presented for decision.

1. The controlling tax regulations provide for two types of installment plans, traditional plans and non-traditional plans. §1.453-2(b). The regulations separately define the term "revolving credit plan." §1.453-2(d)(1). A revolving credit plan is a form of non-traditional installment plan. At issue is whether a revolving credit plan is the only form of non-traditional installment plan contemplated by the controlling tax regulations.

2. This is a second appeal to this Court in the case at bar. The substantive issue framed above was not presented to the Tax Court or to this Court in prior proceedings. It was not earlier focused because, in the first Tax Court proceeding, Grant prevailed on a "traditional plan" theory; on the first appeal Grant unsuccessfully defended that victory; and on remand the Tax Court believed all questions to have been foreclosed by this Court's first

opinion. In all of these prior proceedings both parties indulged an erroneous view of the governing tax law and communicated that mutual error to the Court. At issue is whether in light of the pertinent factors explained below -- including prior legal error, a complete change in economic circumstances of Grant and its more than 10,000 creditors, vast increase in the amount in controversy, and advent of the Trustee in bankruptcy and of new counsel -- the Court will exercise its undisputed authority now to consider the correct legal analysis of the controlling tax regulations.

#### Statement of the Case

W. T. Grant Company ("Grant") is a Delaware corporation, with its principal offices in New York City. During the taxable years in issue (ended January 31, 1964 and 1965) and thereafter until adjudged a bankrupt on April 13, 1976, Grant sold variety goods in more than 1000 stores throughout the United States. Grant qualified as a "dealer in personal property" within the meaning of Internal Revenue Code §453, governing the deferral of income from sales under the installment method. (J.A. 7-8).<sup>1/</sup>

In its retail business Grant, in addition to cash sales, sold merchandise under three customer credit plans: A traditional installment plan, a revolving credit plan,

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<sup>1/</sup> Numbers prefixed by the letters "J.A." refer to pages in the Joint Appendix.

and -- in issue here -- a coupon book installment plan (the "Grant Plan"). Under this plan, Grant issued to a customer a book of coupons (immediately redeemable for merchandise) in a fixed dollar amount for which the customer was required to make payment over a period of not less than four nor more than eighteen months.<sup>2/</sup> The payments were in equal monthly installments determined at the time of issuance of the coupon book and the customer was not billed monthly. Required customer payments totaled the redemption value of the coupons plus a pre-determined finance charge (e.g., for \$100 of coupons, payment of \$10 per month for eleven months). Coupons were immediately exchangeable by the customer for merchandise at any of Grant's stores. (J.A. 9-10). Since each coupon book was numbered, it was identifiable to a particular installment contract. However, due to the enormous volume of coupons exchanged for merchandise, Grant did not identify and record the exchange of each coupon by customer account. (J.A. 11).

The details concerning the operation of the Grant Plan are contained in the Tax Court's findings of fact (J.A. 9-14) and will not be repeated here.

The redemption of coupons for merchandise, and not the initial issuance of coupons, was treated as a sale for accounting purposes. For tax purposes, utilizing the install-

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<sup>2/</sup> In later years the Grant Plan was revised to allow customer payment over a term substantially longer than 18 months.

ment reporting provisions under Internal Revenue Code §453(a) Grant reported income each year to the full extent of profits on payments received from customers. (J.A. 11-12).

The Commissioner of Internal Revenue (the "Commissioner") determined that sales of merchandise under the Grant Plan did not qualify for installment sale treatment for federal income tax purposes, and that no part of the income under the Grant Plan could be deferred, although Grant's receipt of payment was deferred. (J.A. 14).

Following issuance of a statutory notice of deficiency for the taxable years ended January 31, 1964 and 1965, Grant filed in the Tax Court a petition for redetermination. In the first Tax Court proceeding, that tribunal found the Grant Plan a "traditional" installment plan within the meaning of §1.453-2(b)(1) of the controlling tax regulations, and awarded Grant installment (tax deferral) treatment on 100% of its Plan sales. (J.A. 6-41). The Commissioner appealed to this Court. (J.A. 43).

In the first appeal Grant defended its "traditional plan" victory below. The Commissioner argued the negative. Both parties proceeded on the incorrect legal premise that if an installment plan is not "traditional" under §1.453-2(b)(1) of the controlling tax regulations, it is necessarily a "revolving credit plan" under §1.453-2(b)(2). That is, although the latter provision of the regulations is directed generally to sales under a "non-traditional" installment plan, both parties assumed and led this Court to assume that

the only non-traditional installment plan contemplated by the regulations is a "revolving credit plan."

Finding the Grant Plan was not a "traditional" plan, this Court in the first appeal followed the parties' lead and concluded the Grant Plan was a revolving credit plan.

The regulations, §1.453-2(d)(2) and (3), prescribe a special, complex mode of proof that is exclusively applicable to sales under a revolving credit plan. Grant had not submitted to the Tax Court and did not possess the particularized data required by these special revolving credit plan proof rules. For lack of this evidence, which was not relevant under the theory on which the Tax Court held for Grant (J.A. 24-25, 50-51), this Court reversed and remanded.<sup>3/</sup>

On June 20, 1974, Grant filed a Motion for Further Trial in the Tax Court, seeking an opportunity to introduce evidence intended to show that 80% or more of sales under the Grant Plan qualified for installment treatment under §1.453-2(b)(2) of the regulations. (J.A. 53-57). The Tax Court, believing this Court's opinion to have foreclosed all issues, refused to allow Grant to demonstrate that a percentage of its Plan sales qualified for installment treatment. Tax Court Memorandum and Order dated March 21, 1975. (J.A. 58-59). Grant filed a Motion for Reconsideration and Review by the Full Court of Petitioner's Motion for Further Trial. By

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<sup>3/</sup> Grant filed a Petition for Rehearing en Banc, which was denied October 11, 1973, with one dissent. Grant then filed a Petition for a Writ of Certiorari which was denied. 416 U.S. 937 (1974).

Order dated April 15, 1975, the motion was denied. (J.A. 60-63). The Tax Court's decision was entered June 17, 1975. (J.A. 64-65).

Grant timely filed its Notice of Appeal on July 10, 1975. (J.A. 66). Jurisdiction is conferred upon this Court by section 7482 of the Internal Revenue Code.

Bankruptcy of Grant<sup>4/</sup>

On October 2, 1975, Grant filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. On April 13, 1976, Grant consented to its adjudication as a bankrupt, Charles G. Rodman (the "Trustee") qualified as trustee of the Estate of W. T. Grant Company, bankrupt, and was substituted for Grant as petitioner-appellant herein pursuant to an order of this Court dated August 16, 1976. Grant has ceased all retail business activity, has sold all of its merchandise and has closed all of its stores, and is now in the process of final liquidation.

At the time it was adjudged a bankrupt, Grant had an estimated \$500 million in assets and an estimated more than \$1 billion in liabilities.

On February 23, 1976, after Grant had filed its Chapter XI petition and shortly prior to the date Grant was

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<sup>4/</sup> The facts set forth in this section are not contained in the record, since they occurred after the Notice of Appeal. However, the facts are historic and, in any event, this Court may take judicial notice of them since they are reflected in judicial proceedings now pending before the United States District Court for the Southern District of New York (Bankruptcy No. 75 B 1735).

adjudged a bankrupt, the Commissioner filed an amended proof of claim for federal income taxes, and interest accrued thereon, for the ten taxable years of Grant ending January 31, 1966 through and including January 30, 1975, in an amount totaling more than \$84 million. These tax claims arise primarily from the Commissioner's determination that the Grant Plan, which Grant continued to operate and expanded during this period, was ineligible for installment reporting under Internal Revenue Code §453(a).

#### Impact of Grant Bankruptcy

The Tax Court, on remand, found deficiencies in federal income tax due from Grant for its taxable years ended January 31, 1964 and January 31, 1965, in the amounts of \$2,773,786 and \$3,336,501, respectively. (J.A. 64-65). Inclusive of interest, the aggregate deficiency determined by the Tax Court approximated \$9,800,000.

Currently before this Court are only the taxable years of Grant that ended January 31, 1964 and 1965. In subsequent years until its business terminated in bankruptcy, Grant continued and substantially expanded its coupon book installment plan. The federal tax issue now before this Court is presented, in far larger numbers, in subsequent years. With respect to the subsequent years, the Commissioner has filed in the Grant bankruptcy proceeding an amended proof of claim for an aggregate asserted tax deficiency (inclusive of interest) of more than \$84 million. In practical terms, therefore, this is an appeal of a \$93 million income

tax case.

This was not a \$93 million income tax case when initially presented to the Tax Court, when presented to this Court on first appeal, and when reconsidered by the Tax Court on remand from this Court's decision on first appeal. It became a \$93 million income tax case solely by reason of the bankruptcy of Grant.

Prior to that event, the essential issue in this litigation was whether Grant owed interest to the Internal Revenue Service. During the two taxable years in issue before the Court, and for many years thereafter, Grant annually reported sizable profits. Treating a sale under the Grant Plan as income to Grant in the year of sale, or as income to Grant in the later year of customer payment, did not change the amount of federal income tax liability attracted by the sale. But taxing the sale in a year earlier than the payment year (in which payment year Grant had reported the income) did result in liability to the Internal Revenue Service for interest, at 6% per annum, on the earlier year's deficiency.<sup>5/</sup> Additionally, when a Plan

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<sup>5/</sup> To illustrate, assume that \$1 million of installment sale income was reported by Grant in 1966, and tax of \$480,000 was timely paid. If it is determined that the income was properly reportable by Grant in 1965, prior to the advent of bankruptcy the results would have been as follows. Grant owes \$480,000 tax for 1965, but recoups \$480,000 of tax paid for 1966. Grant owes interest (at 6% per annum) on the 1965 tax deficiency, but is owed interest (at the same rate) on its 1966 tax "overpayment." In the result, the gross cost to Grant is \$28,800 (1 year of 6% interest on \$480,000) and, because the \$28,800 of interest liability is deductible by Grant and the effective tax rate is 48%, the net cost to Grant is only \$14,976 (52% of \$28,800).

customer failed to make payment, Grant's resultant bad debt loss, taken in a later but still profitable year, produced for Grant a full quantum of tax recoupment.

With the bankruptcy of Grant, all this changed drastically. Huge losses attended the bankruptcy. But, under the tax law, there is a three year limitation on the bankrupt's right to carry back and apply losses to earlier tax paying years. Neither a bad debt loss nor a payment of interest, in a year of already excess losses, produces any tax recoupment at all.

As a result, what was a dispute between the Commissioner and a viable Grant over several million dollars of interest now has become a dispute over some \$93 million of asserted aggregate tax liability between the Commissioner and the more than 10,000 former suppliers and other public, individual and commercial, creditors of the now bankrupt Grant.

The aggregate 1964-65 deficiency of approximately \$9,800,000, as determined by the Tax Court, has been collected by the Commissioner. He did so by setting off this amount against a federal income tax refund that was due the Trustee for later years. The refund claim arose from the carryback of net operating losses sustained by Grant in the circumstances that led to the bankruptcy on April 13, 1976.

Summary of Argument

1. The controlling tax regulations, §1.453-2(b)(2) [hereafter "¶2(b)(2)"], encompass "non-traditional" installment plans that are not "revolving credit plans." This conclusion is amply confirmed by the specific language of the regulations, by a comparison of the form in which the regulations initially were proposed in 1962 and the form in which they were finally adopted in 1963, and by the Commissioner himself in published Revenue Ruling 71-595.

The regulations define with precision the essential components of a "revolving credit plan." §1.453-2(d)(1) [hereafter "¶2(d)(1)"]. A special, complex mode of proof, tailored to the workings of and exclusively applicable to revolving credit plans is detailed in §1.453-2(d)(2) and (3). In the case of a ¶2(b)(2) non-traditional installment plan that is not a revolving credit plan, the regulations do not call for this special mode of proof. Instead, the regulations permit proof by any accurate accounting computation method appropriate to the terms of the particular plan.

2. In its prior opinion in the case at bar, this Court stated as a conclusion that the Grant Plan was a "revolving credit plan." This conclusion was not reached through analysis of the Grant Plan in the context of the regulations' definition of a "revolving credit plan." Rather, the conclusion rested on the Court's understanding -- given to it by the parties -- that under the regulations all ¶2(b)(2) non-traditional installment plans are "revolving credit plans."

This conception of the regulations is incorrect: not all ¶2(b)(2) plans are "revolving credit plans." The Court's characterization of the Grant Plan as a "revolving credit plan" derived from an erroneous view of the law indulged by both parties. Inadvertently, both parties misled the Court.

3. This case should be remanded to the Tax Court to enable the Trustee to demonstrate (1) the Grant Plan was not a "revolving credit plan" as that term is defined in ¶2(d)(1) of the regulations, and (2) the percentage of sales under the Grant Plan that qualified for installment treatment under ¶2(b)(2) of the regulations. Because the original proceeding in the Tax Court did not focus on the Grant Plan in the context of ¶2(b)(2), the present record does not contain all factual data relevant to (1) the Trustee's contention that the Grant Plan was not a revolving credit plan, and (2) the percentage of Grant Plan sales that qualified for installment treatment.

4. This Court has unquestioned authority now to consider the proper analysis of ¶2(b)(2), the controlling tax regulation. The history of this litigation and drastically changed circumstances -- including a prior erroneous view of the law indulged by both parties, advent of the Trustee in bankruptcy and vast increase in the amount in controversy -- plainly warrant this Court's exercise of its clear authority to consider the proper legal analysis presented, for the first time in this case, by the Trustee on this appeal.

### ARGUMENT

#### I. THE CONTROLLING TREASURY REGULATIONS PROVIDE FOR NON-TRADITIONAL INSTALLMENT PLANS THAT ARE NOT REVOLVING CREDIT PLANS.

##### A. Early History

Installment sale regulations have been part of the tax law since the First World War; the first explicit statutory installment sale provision was enacted in 1926.<sup>6/</sup> At that time and for many years thereafter installment sales were invariably "traditional": Each separate purchase was reflected in a separate agreement under which, ordinarily, the dealer retained security title in the goods pending full and final payment by the customer. The "non-traditional" installment plan, a single agreement for deferred payment allowing the customer more than one purchase on one or more than one occasion, was not a 1920s merchandising technique. Non-traditional installment plans first gained attention in the United States shortly before the Second World War, and did not become important in American retail merchandising until some years after that conflict had ended.<sup>7/</sup>

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<sup>6/</sup> §212(d), Revenue Act of 1926, 44 Stat. 9, 26. Cf. §202(f), Revenue Act of 1921. Installment (tax deferred) treatment was reflected in prior Treasury Regulations promulgated without statutory authority. The earliest was Regulation 33 (Revised), Articles 116 and 117 (1918). See also Regulation 45, Article 42 (1919), which first established a uniform rule for reporting installment sales. Cf. B. B. Todd, Inc., 1 B.T.A. 762 (1925), which held the earlier regulations invalid and led to the enactment of the retroactively effective 1926 statute. The current statute is Section 453(a), Internal Revenue Code of 1954.

<sup>7/</sup> See Consolidated Dry Goods Company v. United States, 180 F.Supp. 878, 879-80 (D. Mass. 1960).

The Treasury's regulations, first drafted when only "traditional" installment sales were in vogue, were understandably general in scope. The regulations retained that nonspecific character for more than four decades.<sup>8/</sup> Thus,<sup>9/</sup> the 1958 version of the pertinent "¶2(b)" regulation read:

2(b). Installment income of dealers in personal property. The income from installment sales of a dealer, that is, a person regularly engaged in the sale of personal property on the installment plan, may be ascertained by treating as income that proportion of the total payments received in the taxable year from installment sales (such payments being allocated to the year against the sales of which they apply) which the gross profit realized or to be realized on the total installment sales made during each year bears to the total contract price of all such sales made during that respective year. A dealer who desires to compute income by the installment method shall maintain accounting records in such a manner as to enable an accurate computation to be made by such method in accordance with the provisions of this section, section 446, and §1.446-1.

B. The Treasury's Determination to Amend the Regulations.

A non-traditional installment plan was first spotlighted under the tax law in 1960. That year the Massachusetts Federal District Court held sales under a

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<sup>8/</sup> Compare Regulation 45, Article 42, as amended in T.D. 3082, 3 Cum. Bull. 107 (1920), with Regulations, §39.44-1(a) and (b), effective September 26, 1953, under the Internal Revenue Code of 1939.

<sup>9/</sup> Regulations, §1.453-2(b), T.D. 6314 (filed September 17, 1958). The ¶2(b) regulation, in its 1963 amended form, governs the case on this appeal.

revolving credit plan, although non-traditional<sup>10/</sup> and not contemplated by the 1920s drafters, nonetheless qualify 100% for tax deferral. Consolidated Dry Goods Company v. United States, 180 F.Supp. 878 (D.Mass. 1960).

The Commissioner of Internal Revenue promptly published his concern. Rev. Rul. 60-293, 1960-2 Cum. Bull. 163. "Installment" means one of two or more.<sup>11/</sup> Although the vast majority of revolving credit plan sales may well be paid for in two or more installments,<sup>12/</sup> in some cases the customer will pay promptly and in full, if only to avoid finance charges. Consolidated Dry Goods allowed deferral to all revolving credit sales. The Commissioner, and the Treasury Department, would formulate "workable standards" to distinguish the high percentage of sales properly entitled to deferral from the "single payment" minority that are not.

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<sup>10/</sup> The District Court contrasted the "attribution of each payment to the purchase price of one specific item sold," a feature of "earlier [traditional] installment plans," with the non-traditional plan at issue before it "designed to cover not a single large sale but a series of transactions involving numerous smaller items." 180 F.Supp. at 882.

<sup>11/</sup> See Thomas F. Prendergast, Extr., 22 B.T.A. 1259 (1931).

<sup>12/</sup> Cf. S. Rep. No. 830, 88th Cong. 2d Sess. 99 (1964), contemplating installment sale treatment for about 80 percent of revolving credit sales.

The product of that effort was the 1962-63 revision and expansion of the Section 453 dealer installment sale regulations. Proposed amendments to the regulations, published October 9, 1962,<sup>13/</sup> were a clear and pointed reaction to the Consolidated Dry Goods decision, and focused narrowly and explicitly on revolving credit plans.

After hearings in accordance with the Administrative Procedure Act, final amendments to the regulations were promulgated October 15, 1963.<sup>14/</sup> The final version differed from the prior year's proposal in one and only one major respect. Under the 1962 proposed amendments, the regulations would have adverted to, and covered, only traditional installment plans and revolving credit plans. The 1963 final regulations advert to, and cover, traditional installment plans and all non-traditional installment plans including but not limited to revolving credit plans. Moreover -- and of signal importance in the case at bar -- the final regulations impose technical, detailed and complex proof requirements only for sales under "revolving credit plans" as that term is defined in the amended regulations. For non-traditional installment sales that are not sales under "revolving credit plans," other modes of proof may be employed.

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<sup>13/</sup> 27 Fed. Reg. 9920.

<sup>14/</sup> T.D. 6682, 28 Fed. Reg. 11176.

C. The 1962 Proposed Amendments to the Regulations.

The 1962 proposed amendments propounded the following additions to and changes in the Section 453 dealer regulations.

1. The addition of a new ¶2(d), <sup>15/</sup> aptly entitled and exclusively directed to the revolving credit plan. Proposed ¶2(d)(1) defined, for purposes of the installment sale regulations, the term "revolving credit plan." The balance of proposed ¶2(d) supplied needed auxiliary definitions and prescribed a special mode of proof "under which a certain percentage [statistically derived using sampling techniques] of sales under a revolving credit plan will be treated as sales on the installment plan."

2. The addition of a revolving credit plan directive in proposed ¶1(a)(1): <sup>16/</sup>

To the extent provided in paragraph (d) of §1.453-2, sales under a revolving credit type plan will be treated as sales on the installment plan and the income therefrom may be returned on the installment method.

3. Historic ¶2(b), <sup>17/</sup> in a slightly expanded version, was redesignated ¶2(c). <sup>18/</sup> As redesignated, the provision

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<sup>15/</sup> Proposed Regulations, §1.453-2(d) (1962).

<sup>16/</sup> Proposed Regulations, §1.453-1(a)(1) (1962).

<sup>17/</sup> Regulations, §1.453-2(b) (1958 version).

<sup>18/</sup> Proposed Regulations, §1.453-2(c) (1962).

maintained in the law, without change, the regulations' historic requirement subjecting every installment sale to proof by the dealer through accurate computation:

A dealer who desires to compute income by the installment method shall maintain accounting records in such a manner as to enable an accurate computation to be made by such method in accordance with the provisions of this section, section 446, and §1.446-1.

4. Finally, 1962 proposed ¶2(b)<sup>19/</sup> was wholly new in the regulations:

2(b). Definition of installment plan. The term "installment plan" means any plan, system, or other arrangement for the sale or other disposition of personal property, which under its terms and conditions, contemplates that each sale of personal property under the plan will be paid for in two or more payments. [Emphasis supplied.]

Although broadly entitled "definition of installment plan," in reality 1962 proposed ¶2(b) encompassed only the traditional installment plan in which "each" sale separately contemplates two or more payments earmarked to that sale.

Thus, reactive to and critical of Consolidated Dry Goods' allowance of 100% tax deferral to the revolving credit plan seller, the 1962 proposed amendments made exclusive reference to, and drew a bright line between, traditional installment sales and revolving credit

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<sup>19/</sup> Proposed Regulations, §1.453-2(b) (1962).

sales. Sales under traditional installment plans -- each sale separate and each sale separately contemplating two or more payments -- qualified 100% for tax deferral. Sales under revolving credit plans -- a term newly defined in ¶2(d)(1) of the proposed regulations -- were subject to special requirements of sampling and statistical proof, proof tailored to the nature and operation of revolving credit plans, under which a high percentage, but never 100%, would qualify for tax deferral.

And that was that. Under the 1962 proposed regulations, only two categories. Either traditional or revolving credit. There was no recognition in the 1962 construct of a non-traditional installment plan that did not fit the "revolving credit plan" definition of 1962 proposed ¶2(d)(1).

D. The Need to Revise the 1962 Proposed Amendments.

To comprehend the purpose and effect of the changes (described below) made by the Treasury Department in 1963, when it adopted the 1962 proposed amendments in significantly revised form, at this juncture it is useful to consider two questions.

First, did the 1962 proposed amendments fully and adequately respond to the Commissioner's expressed concern with the Consolidated Dry Goods tax treatment of revolving credit plan sales?

Subject only to the refining of sampling and testing procedures, the answer must be an unqualified "yes." Under the 1962 proposed amendments, Consolidated Dry Goods and its 100% qualification conclusion -- the focus of the Commissioner's concern -- would have no possible continuing application to sales under "revolving credit plans." Thus, the 1963 changes plainly were directed to a Treasury concern other than the adequacy of the coverage of revolving credit plans.

Second, had the proposed amendments been adopted as formulated in 1962, what tax treatment would have been accorded a dealer selling merchandise under a non-traditional installment plan that was not a "revolving credit plan" as defined in ¶2(d)(1)?

1. This is not a question of if such a plan is developed. It is a question of when it is developed. American merchants are innovative and new selling techniques evolve constantly. The 1920s Treasury drafters never considered revolving credit because revolving credit was not then a part of merchant practice. The later drafters who, as far along as 1958, readopted without material change the historic, nonspecific regulatory formulation<sup>20/</sup> also failed to consider revolving credit. Not because revolving credit did not then exist in merchant practice -- it did and was important

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<sup>20/</sup> See the 1958 version of ¶2(b) of the regulations, quoted above at page 14.

and expanding -- but simply because the drafters never adverted to the existence of this selling technique.

The lesson of the past was clear in 1963. Sooner or later merchants would put into operation new, or at least hitherto unperceived (by the Treasury Department), installment sale techniques which fit neither the traditional nor the ¶2(d)(1) defined revolving credit plan mold.<sup>21/</sup>

2. The question, how to treat under the 1962 regulations proposal the non-traditional plan that is not a ¶2(d)(1) revolving credit plan, admits of two answers, neither satisfactory.

(a) One response is Draconian: The 1962 formulation freezes permissible commercial practice. If the plan is not traditional and is not a ¶2(d)(1) defined revolving credit plan, installment tax treatment is foreclosed. No matter how clear the installment payment nature of the plan, the dealer must pay tax now on cash he will not receive for months or years, simply because his innovation broke the mold.

(b) The alternate response would embrace the original Congressional intention to equate payment of tax with receipt of sale proceeds, as had the Massachusetts Federal District Court in Consolidated Dry Goods. Unwilling

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<sup>21/</sup> This in fact occurred. See Rev. Rul. 71-595, 1971-2 Cum. Bull. 223. This important ruling under ¶2(b)(2) is discussed below in part I G of this brief.

to attribute a Draconian solution to the Treasury, or unwilling to approve it, a court might well strain the fabric of the regulations, either (1) resurrecting Consolidated Dry Goods to fill a judicially perceived gap in the 1962 regulatory scheme's "only two categories" formulation, or (2) holding the innovative non-traditional installment plan the qualifying equivalent of a traditional installment plan.<sup>22/</sup> Under either approach, 100% of non-traditional installment plan sales would receive deferred tax treatment. The Treasury's announced objective<sup>23/</sup> was to permit tax deferral only for an appropriate percentage of sales. The Treasury would react to this alternate response possibility, the possibility of 100% tax deferral, with understandable distress.

#### E. The 1963 Final Regulations

In adopting its final regulations in 1963, the Treasury revised and expanded the 1962 proposal to fill the gap between traditional installment plans and §2(d)(1) defined revolving credit plans. Contrary to the 1962 proposal, the 1963 final regulations encompass a third category: a non-traditional installment plan which is not a §2(d)(1) defined "revolving credit plan."

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<sup>22/</sup> This, of course, is exactly what was done in the case at bar by the Tax Court in its initial decision, 58 T.C. 290 (1972).

<sup>23/</sup> Rev. Rul. 60-293, 1960-2 Cum. Bull. 163.

The solution achieved in the 1963 final regulations met the Treasury's overriding objective of reversing for all non-traditional plan cases the 100% qualification result reached in Consolidated Dry Goods. At the same time, the 1963 solution avoided a Draconian freezing of the forms of installment plan available to merchants.

1. Revolving credit plans were specifically and fully covered in 1962 proposed ¶2(d) [revolving credit plans definition and special proof] and ¶1(a)(1) [directing that revolving credit plans must comply with ¶2(d)]. In the 1963 final regulations, ¶2(d) was revised only to better detail the sampling and statistical proof requirements, and in various non-substantive respects. Importantly, the 1963 final regulations adopted the 1962 proposed definition of "revolving credit plan" without substantive change.

2. Final ¶2(c) retained, as had the 1962 proposal, the regulations' historic requirement subjecting every installment sale to proof by the dealer through accurate accounting computation.

3. ¶2(b) was radically altered in the final regulations.<sup>24/</sup> This complete revision of the scheme of the ¶2(b) regulations was never called to the attention of or considered by this Court in the first appeal of this case.

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<sup>24/</sup> Regulations, §1.453-2(b), as amended by T.D. 6682 (filed October 15, 1963).

(a) In the 1962 proposed amendments ¶2(b), although broadly entitled "definition of installment plan," in actuality defined only the traditional installment plan. In the 1963 final regulations the traditional plan definition was retained without substantive change. However, consigned to subparagraph status as ¶2(b)(1), the traditional plan definition became the first of two alternate installment plan definitions.

In the 1963 final regulations, ¶2(b)(1) states:

2(b). Definition of sale on the installment plan. The term "sale on the installment plan" means --

(1) A sale of personal property by the taxpayer under any plan for the sale or other disposition of personal property which plan, by its terms and conditions, contemplates that each sale under the plan will be paid for in two or more payments, or.... [Emphasis supplied.]

The final regulations also added an instructional sentence at the end of ¶2(b) (the first sentence in the so-called ¶2(b) "flush language"):

Normally, a sale under a traditional installment plan (as described in paragraph (a)(1) of this section 25/), meets the requirements of subparagraph (1) of this paragraph [2(b)].

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25/ The apparent reference is to Regulations, §1.453-1(a)(1) which, in pertinent part, summarize the usual characteristics of a traditional installment plan (separate installment contract for each sale, etc.).

(b) Wholly new in the 1963 final regulations was ¶2(b)(2), generally defining for the first time the non-traditional installment plan:

2(b). Definition of sale on the installment plan. The term "sale on the installment plan" means --

(1) [Sale under a traditional installment plan] or

(2) A sale of personal property by the taxpayer under any plan for the sale or other disposition of personal property --

(i) Which plan, by its terms and conditions, contemplates that such sale will be paid for in two or more payments, and

(ii) Which sale is in fact paid for in two or more payments.

[Emphasis supplied.]

Again the final regulations added an instructional sentence at the end of ¶2(b) (the final sentence in the so-called ¶2(b) "flush language"):

See paragraph (d) of this section for the application of the requirements of subparagraph (2) of this paragraph [2(b)] to sales under revolving credit plans.

4. Thus, in the 1963 final regulations ¶2(b)(1) installment plans are traditional: Each sale contract that contemplates two or more payments automatically receives installment tax treatment. ¶2(b)(2) installment plans are non-traditional -- there is no separate agreement for "each" sale -- and the mere contemplation of multiple payments, while necessary, is insufficient: The dealer also

must furnish appropriate proof that the "sale in fact is paid for in two or more payments."

5. If in the particular case ¶2(b)(2) non-traditional installment plan sales qualify as sales under "revolving credit plans," the final (flush language) sentence of ¶2(b) directs reference to ¶2(d) in which the term "revolving credit plan" is defined and a specific, detailed and technical mode of proof set forth. But, while every ¶2(d) revolving credit plan is a ¶2(b)(2) non-traditional installment plan, not every ¶2(b)(2) non-traditional installment plan is a revolving credit plan as that term is defined in ¶2(d).<sup>26/</sup> ¶2(b)(2) obviously is broader in scope than is ¶2(d); were it not, there would be no reason for ¶2(b)(2) at all.

(a) The final instructional sentence in the ¶2(b) "flush language" supplies confirmation: "See paragraph (d) of this section for the application of the requirements of subparagraph (2) of this paragraph to sales under revolving credit plan."

Had the Treasury, in 1963, meant to subject all ¶2(b)(2) non-traditional plans to the strictures of ¶2(d), it would have written the regulations quite differently. Indeed, if the only qualifying non-traditional plans were to be ¶2(d)(1) revolving credit plans, the Treasury in

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<sup>26/</sup> The Commissioner has demonstrated his agreement with this conclusion in Rev. Rul. 71-595, 1971-2 Cum. Bull. 223, discussed below in part I G of this brief.

revising its 1962 proposal could and would have said so.

For example, such a ¶2(b) might read:

2(b). Definition of sale on the installment plan. The term "sale on the installment plan" means --

(1) [Sale under a traditional installment plan] or

(2) A sale under a revolving credit plan which meets the requirements of ¶2(d).

(b) The ¶2(d)(1) definition of a "revolving credit plan" is obviously narrower in scope than the ¶2(b)(2) overall definition of a non-traditional installment plan.

¶2(d)(1) provides:

The term "revolving credit plan" includes cycle budget accounts, flexible budget accounts, continuous budget accounts, and other similar plans or arrangements for the sale of personal property under which the customer agrees to pay each billing-month (as defined in subparagraph (6)(iii) of this paragraph) a part of the outstanding balance of his account.

Subparagraph (6)(iii) of ¶2(d) defines the key term "billing-month"

(6)(iii) A billing-month is that period of time for which a periodic statement of charges and credits is rendered to a customer.

One simple example will suffice to confirm that the ¶2(d) revolving credit plan definition is narrower in scope than the ¶2(b)(2) overall definition of a

non-traditional installment plan.<sup>27/</sup>

Assume dealer X propounds the following "Unitary Credit Plan" available to any customer having an adequate credit standing. On day-1 customer pays to X a deposit of \$50 to enter the plan. At any time or from time to time during the next three months, the customer may purchase on credit up to an aggregate of \$1,000 of merchandise. Three and one-half months following day-1, the customer will receive from X a single billing statement (payable immediately) in an amount equal to 103% of the excess of the customer's credit purchases above the \$50 deposit (e.g., if the customer buys \$850 in merchandise, the bill will be 103% of \$800 or \$824). If the customer buys less than \$50 of merchandise during the three month term of the Plan, the unused portion of his deposit will be refunded, without interest, at the time he receives the single billing statement.<sup>28/</sup>

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<sup>27/</sup> Another confirming example is contained in Rev. Rul. 71-595, 1971-2 Cum. Bull. 223, discussed below in part I G of this brief.

<sup>28/</sup> The suggested Unitary Credit Plan is an amalgam of features in current commercial use. The deposit encourages the customer to shop. The availability of substantial credit encourages substantial purchasing, but the customer may elect to avoid any finance charge (the 3% override) by limiting total purchases to \$50. Like "fly now/pay later," the Plan enables the merchant to advertise that the customer will not be billed until some months hence and will not be bothered in the interim. Finally, under the Plan the customer desiring to make substantial purchases is strongly encouraged to purchase early, since the financing charge (3% of credit purchases) is the same gross amount whether the customer buys within 15 days following day-1 (producing an interest rate of 1% per month for each of the three months until payment is due) or waits 60 days before purchasing (resulting in an effective interest rate greater than 2% per month). A merchant desiring to foster prompt semi-annual inventory clearance might offer a Plan of this sort twice each year.

The described Unitary Credit Plan does not qualify as a ¶2(b)(1) traditional installment plan. Under a traditional plan each sale must contemplate two or more payments. The Unitary Credit Plan customer who purchases not more than \$50 in merchandise has made a single payment, in full and in advance. Rev. Rul. 71-595,<sup>29/</sup> 1971-2 Cum. Bull. 223, confirms that a plan encompassing a single payment feature cannot qualify as a ¶2(b)(1) traditional installment plan.

Equally clearly, the Unitary Credit Plan is not a revolving credit plan as defined in ¶2(d)(1) of the 1963 final regulations. Under the Plan, only a single statement, three and one-half months hence, will be rendered by X to the customer. ¶2(d) requires as a definitional matter that "a periodic statement of charges and credits is rendered to a customer" under a revolving credit plan. One statement rendered three and one-half months hence is not a "periodic" statement, either as a matter of common usage<sup>30/</sup> or

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<sup>29/</sup> This important Revenue Ruling is discussed below in part I G of this brief.

<sup>30/</sup> The Random House Dictionary of the English Language (Unabridged Edition) defines "periodic" as "recurring at intervals of time; occurring or appearing at regular intervals...."

or within the meaning of the tax law.<sup>31/</sup>

But the described Unitary Credit Plan unquestionably qualifies as a ¶2(b)(2) non-traditional installment plan: It contemplates two payments (\$50 on day-1 and the balance three and one-half months later) and the substantial majority of, but probably not all, sales under it in fact will be paid for in two installments.<sup>32/</sup>

#### F. Mode of Proof

The dealer who sells under a ¶2(d)(1) defined revolving credit plan is required to prove the percentage of charges under the plan qualifying for installment tax deferral. That proof must be made utilizing a detailed sampling technique employing statistical methods.<sup>33/</sup>

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<sup>31/</sup> For example, Internal Revenue Code ("IRC") Section 1402 which defines generally an individual's "net earnings from self-employment," provides in certain circumstances for an exclusion from income for payments received by a partner, on a periodic basis, on account of retirement. Regulations, §1.1402(a)-17(b)(2), leaves no doubt that more than one payment is required: "Payments are made on a periodic basis if made at regularly recurring intervals...." Similarly, amounts subject to taxation under the annuity rules of IRC Section 72 must be payable in periodic installments, defined as payments "at regular intervals (whether annually, semiannually, quarterly, monthly, weekly or otherwise)...." Regulations, §1.72-2(b)(ii). See also IRC Section 71(a)(1), dealing with alimony payments, which defines periodic payments as payments recurring at intervals of time.

<sup>32/</sup> Assume day-1 is the first day of the last month of dealer X's taxable year. If in that month the customer made one single large purchase (\$850), there is in fact a two payment sale. If the customer's only purchase that month were a single \$40 item, it is not a two payment sale since X already has received \$50 from the customer.

<sup>33/</sup> Regulations, §1.453-2(d)(2), (3); Rev. Proc. 65-5, 1965-1 Cum. Bull. 720, modifying and amplifying Rev. Proc. 64-4, 1964-1 (Part 1) Cum. Bull. 644.

The special proof procedure set out in ¶2(d) and amplified in highly technical Internal Revenue Service pronouncements<sup>34/</sup> is applicable, under the 1963 final regulations, to and only to a "revolving credit plan" as that term is defined in ¶2(d)(1). The ¶2(d) proof procedure does not contemplate installment plans other than those defined in ¶2(d)(1).

The special ¶2(d) rules of proof were designed specifically to take account of the particular features of ¶2(d)(1) defined revolving credit plans. These features include mandatory periodic billing reflecting both new charges (finance charges and purchases) and credits for required part payments of the account balance.<sup>35/</sup> When the regulations were adopted in 1963 there was no way of knowing, just as there is no way of knowing today, whether the specialized ¶2(d) rules of proof will fit the characteristics of an as yet unidentified non-traditional installment plan that is not a ¶2(d) defined revolving credit plan.

The ¶2(d) proof rules may not "fit" plans, other than those defined in ¶2(d) itself, for either of two reasons.

First, the terms of the non-traditional plan may be such that the ¶2(d) proof rules, when applied to that plan, simply do not work. The Unitary Credit Plan, described

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<sup>34/</sup> See Rev. Proc. 65-5 and Rev. Proc. 64-4, supra n. 33.

<sup>35/</sup> See Regulations, §§1.453-2(d)(1), 1.453-2(d)(6)(iii). This matter is considered in greater detail below in Part III of this brief.

above on pages 28-30, furnishes an example. If the Plan commences on January 1 and the dealer's taxable year ends the last day of February, the ¶2(d) proof rules cannot be applied to develop a valid percentage of qualifying installment sales.<sup>36/</sup> To fit the postulated Unitary Credit Plan, a statistically based method of proof can be utilized, but must be tailored to the specific terms of the Plan.

Second, the terms of the non-traditional plan may be such that, although the ¶2(d) proof rules conceivably might be applied, a less narrowly specific, less complex, less costly method of proof can be used to derive the requisite percentage of qualifying installment sales. If meeting the technical requirements of the ¶2(d) proof rules would force the dealer to maintain, at great expense, records that serve no other function, the dealer should not be put to that expense when another method of proof, tailored to the particular terms of the non-¶2(d)(1) plan, will establish the requisite percentage figure.

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<sup>36/</sup> Assume that all customers under the Plan purchase merchandise during the first month (January). Eighty percent of the customers purchase more than \$50 in merchandise during that month and the other 20% purchase \$50 or less in merchandise during that month. Assume further that half of the 20% minority of customers make substantial (more than \$50) purchases in the second month (February) while the other half (10% of the total customers under the Plan) make no purchases in February. At the end of February, the dealer's taxable year closes. Although it is clear that "in fact" a high percentage of total Plan sales during the dealer's taxable year were qualified installment sales, the ¶2(d) proof rules cannot be used to derive that percentage or, it would appear, any percentage at all. See the second sentence of Regulations, §1.453-2(d)(3)(ii), articulating an arithmetic test which, as applied to sales under the Unitary Credit Plan, seemingly directs a zero-percentage conclusion.

The dealer selling under a ¶2(b)(2) non-traditional installment plan that is not a ¶2(d)(1) defined revolving credit plan must prove the percentage of qualifying sales through ¶2(c) accurate computation.<sup>37/</sup> A percentage obtained using sampling procedures, probability techniques or other statistical methods can qualify as the product of an "accurate computation" under ¶2(c).<sup>38/</sup>

The use of such statistical methods -- indeed, the use of sampling, probability and statistical techniques designed to fit the taxpayer's particular business circumstances -- is a well established accurate computation and accounting concept in federal income tax law. A pertinent example is Regulations, §1.47-1(e)(2)(i), directed to the treatment of "mass assets" under the investment tax credit. The provision recognizes that it may be "impracticable" for a taxpayer to maintain in his business specifically prescribed records, and permits the taxpayer to substitute data based on "an acceptable sampling of the taxpayer's actual experience or other acceptable statistical or engineering techniques." See also Regulations, §1.472-8(e)(1), sanctioning similar flexibility for a dealer who must make certain LIFO inventory computations and finds it "impractical" to use the normally prescribed method of computation.

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<sup>37/</sup> See Regulations, §1.453-2(c)(1)(last sentence).

<sup>38/</sup> The ¶2(d) proof rules, which employ statistical methods, confirm that such methods meet the accurate computation requirement of ¶2(c).

G. Revenue Ruling 71-595

In 1971 the Commissioner of Internal Revenue announced that a plan contemplating deferred payment may be a §12(b)(2) non-traditional installment plan although it is not a revolving credit plan. Rev. Rul. 71-595, 1971-2 Cum. Bull. 223.

In the ruling case taxpayer M adopted a deferred multiple payment plan under which it sold merchandise to customers during the last six months of each calendar year. Under the plan a customer purchasing merchandise in July was permitted to make payment in three equal installments on, respectively, October 10th, November 10th and December 10th. Alternatively, the customer could elect to make a single payment by August 10 (the tenth day of the month following shipment) in which event the customer was allowed a 2% discount. The plan established similar arrangements for August and September sales and somewhat different arrangements for sales made in the last calendar quarter. M's taxable year ended September 30. Thus, all payments on July sales would be received by M in its next succeeding taxable year if the customer proceeded under the deferred multiple payment plan, and a single payment (at 2% discount) would be received by M in the taxable year of sale if the customer elected to prepay.

In Rev. Rul. 71-595 the Commissioner first held that because the customer could elect to make a single discounted payment, the plan did not contemplate that "each

sale under the plan will be paid for in two or more payments within the meaning of [¶2(b)(1)] of the regulations."

(Emphasis in original). Thus, ruled the Commissioner, M's plan was not a ¶2(b)(1) traditional installment plan.

The Commissioner then held that because the customer could choose two or more payments, the plan "does contemplate that such sales (although not necessarily each sale) will be paid for in two or more payments within the meaning of [¶2(b)(2)] of the regulations." (Emphasis in original). The Commissioner concluded:

Accordingly, in the instant case, a sale by the taxpayer [M] which is in fact paid for in two or more payments, as provided for by section 1.453-2(b)(2)(ii) of the regulations, is considered to be a "sale on the installment plan." ... [T]he sales made by the taxpayer [M] which are in fact paid for in two or more payments may be reported on the installment method under section 453(a) of the Code.

In Rev. Rul. 71-595 the Commissioner held the M plan a ¶2(b)(2) non-traditional installment plan. But the M plan clearly was not a "revolving credit plan" and, under the ruling, M is not directed to use the special "revolving credit plan" proof rules of ¶2(d)(2) and (3) to demonstrate the fact of "two or more payments" and the resultant percentage of plan sales that qualifies for installment treatment.

Thus, in Rev. Rul. 71-595 the Commissioner has acknowledged and confirmed that the controlling Treasury Regulations contemplate and provide for non-traditional installment plans that are not revolving credit plans and that are not subject to the special proof rules exclusively applicable to revolving credit plans.

II. IN CHARACTERIZING THE GRANT PLAN A "REVOLVING CREDIT PLAN," THIS COURT DID NOT LOOK TO THE REGULATIONS' DEFINITION OF THAT TERM AND INSTEAD MERELY ADOPTED THE PARTIES' MUTUAL MISSTATEMENT OF THE LAW.

In its prior opinion, 483 F.2d 1185 (2d Cir. 1973), this Court stated as a conclusion that the Grant coupon book installment plan (the "Grant Plan") was a revolving credit plan.<sup>39/</sup> From that conclusion all else followed: Under the regulations, a revolving credit plan sale to qualify for installment treatment must satisfy ¶2(d)(2) and (3) detailed, technical proof rules that are exclusively applicable to sales under a "revolving credit plan."

The Court's conclusion, that the Grant Plan was a revolving credit plan, was not reached through analysis of the Plan in the context of the regulations' definition of a "revolving credit plan."<sup>40/</sup> Rather, the conclusion rested on the Court's understanding -- given to it by the parties -- that under the 1963 regulations all ¶2(b)(2) non-traditional installment plans are "revolving credit plans."

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<sup>39/</sup> The Court stated: "\$453 is to be extended to revolving credit plans, such as Grant's subject however to the regulation and proof requirements [¶2(d)] deemed warranted by the Commissioner [emphasis supplied]." 483 F.2d at 1119.

<sup>40/</sup> The term is defined in ¶2(d)(1). The Court did not cite or discuss ¶2(d)(1), nor did the court cite or discuss the origin of the ¶2(b)(2) non-traditional plan definition, which was not part of the 1962 proposed regulations and first appeared in the 1963 final regulations. See the prior discussion in part I of this brief.

This conception of the 1963 regulations was incorrect.<sup>41/</sup> The Court's decisive conclusion derived from an erroneous view of the law indulged by both parties. Inadvertently, both parties misled the Court.<sup>42/</sup>

A. The Original Tax Court Proceeding

In the first Tax Court proceeding Grant argued that its Plan qualified as a ¶2(b)(1) traditional installment plan entitled to 100% tax deferral. The Commissioner argued the negative. Neither party focused upon the ¶2(b)(2) non-traditional installment plan provision or considered the relationship of that provision to the ¶2(d)(1) definition of a "revolving credit plan."<sup>43/</sup> The Tax Court held the Grant Plan a ¶2(b)(1) traditional installment plan. 58 T.C. 290 (1972). The Commissioner appealed.

B. First Appeal to this Court.

On appeal, Grant defended a victory, a holding that Grant's Plan qualified for 100% deferral as a traditional installment plan. The Commissioner filed the first appellate

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<sup>41/</sup> See part I of this brief.

<sup>42/</sup> We do not suggest nor do we believe that either party intended to mislead the Court.

<sup>43/</sup> In the first Tax Court proceeding the case was submitted on stipulated facts. There was no oral argument to the Tax Court. Arguments were presented in the written briefs filed by each party.

brief.<sup>44/</sup> In it the Commissioner took the following positions.

1. The Grant Plan was not a traditional plan, but was instead a non-traditional installment plan as defined in ¶2(b)(2). Therefore, a sale under the Grant Plan qualified for installment (deferred tax) treatment only if "in fact paid for in two or more installments." On page 22 of the Commissioner's brief:

Clearly any sales made under taxpayer's coupon book installment plan which in fact were paid for in two or more installments fit under the definition enunciated in Section 1.453-2(b)(2), since the plan contemplates sales which may be paid for in more than one installment.

2. The Commissioner claimed that the Grant Plan was a revolving credit plan. However, the Commissioner did not turn the attention of the Court to the "revolving credit plan" definition set forth in ¶2(d)(1). Instead, he announced that the ¶2(b)(2) non-traditional installment plan provision was added to the regulations in 1963 for the specific purpose of dealing with revolving credit plans. Based upon this faulty premise as to the purpose and function of ¶2(b)(2), the Commissioner constructed the following syllogism:

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<sup>44/</sup> In the case at bar, a principal issue is whether the Court should, as it has clear authority to do, revise its prior opinion in light of the new legal analysis presented on this second appeal by the Trustee as successor to Grant. Analysis of the briefs filed in the first appeal is appropriate and necessary to the determination of the issue on this appeal. See United States v. Fullard-Leo, 156 F.2d 756, 759 (9th Cir. 1946), aff'd, 331 U.S. 256 (1947); Chase v. United States, 261 Fed. 833, 839 (8th Cir. 1919), aff'd, 256 U.S. 1 (1921); and other authorities cited in part IV of this brief.

(1) The ¶2(b)(2) non-traditional installment plan provision was designed solely to cover revolving credit plans. (2) The Grant Plan was a ¶2(b)(2) non-traditional installment plan. (3) Therefore, the Grant Plan must be a revolving credit plan. As such, it is subject to the special proof rules of ¶2(d)(2) and (3) which apply to (and only to) revolving credit plans.

The Commissioner's brief is replete with confirmation.

At page 13:

The Commissioner, dissatisfied with the result [of the Consolidated Dry Goods decision], thereafter promulgated subsection (2) of Regulations §1.453-2(b) in which he provided for installment plan treatment of certain amounts received under revolving credit plans, provided such amounts are derived from sales which in fact are paid for in two or more installments.

At pages 19-20:

[I]t was the District Court's holding in [Consolidated Dry Goods] that a revolving credit plan came within the ordinary meaning of "installment plan" and therefore that sales made thereunder qualified for Section 453 treatment, which led to the promulgation of Treasury Regulations Section 1.453-2(b)(2), setting forth the conditions under which revolving credit plans qualify for installment reporting.

At page 21:

As noted, supra, Treasury Regulations Section 1.453-2(b)(2) was promulgated to deal specifically with revolving credit plans and analogous situations such as the one here in issue.

At page 22:

In order to make this factual showing [under ¶2(b)(2), that the sale was in fact paid for in two or more payments], the taxpayer must comply with the record-keeping provisions [i.e., the special proof rules] of Regulations Section 1.453-2(d), which require that records be kept in sufficient detail to enable the taxpayer to apply a sampling device set forth in the Regulations [¶2(d)(2) and (3)]. In the absence of such record keeping, the factual showing that alleged installment sales were paid for in two or more payments cannot be made, and the taxpayer is denied installment treatment of such sales.

3. The Commissioner made no reference to the 1962 proposed amendments to the installment sale regulations. His brief failed to note that the ¶2(b)(2) non-traditional installment plan provision was added in 1963 to fill the 1962 proposed regulations' gap between ¶2(b)(1) traditional installment sales and ¶2(d)(1) defined "revolving credit plan" sales. Thus, by equating all ¶2(b)(2) non-traditional installment plans to "revolving credit plans," the Commissioner led this Court to believe that the regulations contemplate only two categories: traditional installment plans under ¶2(b)(1) and revolving credit plans under ¶2(b)(2).

4. The Commissioner failed to call the Court's attention to Rev. Rul. 71-595,<sup>45/</sup> in which he had embraced a position contrary to the "only two categories" argument he presented to this Court.

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<sup>45/</sup> Discussed in part I G of this brief.

Grant's responding brief was devoted principally to a defense of its victory in the Tax Court. Grant argued that its Plan qualified as a ¶2(b)(1) traditional installment plan. Less than three pages of the Grant brief (pp. 17-20) addressed revolving credit plan considerations.

1. Like the Commissioner, Grant did not advert to the ¶2(d)(1) definition of a "revolving credit plan." Instead, Grant looked to the custom and understanding of merchants to support its position that the Grant Plan was not a "revolving credit plan."

2. Grant expressed no disagreement with the Commissioner's erroneous presentation of the origin and scope of the ¶2(b)(2) non-traditional installment plan provision. Instead, in what may have been an attempt to turn the Commissioner's argument on its head, Grant seemingly advanced the following syllogism: (1) Under the regulations an installment plan is either a traditional plan or a revolving credit plan. (2) The Grant Plan was not a revolving credit plan within the custom and understanding of merchants and in its operation bore a "close similarity" to the way in which a traditional installment plan operates. (3) Therefore, the Grant Plan qualified as a traditional installment plan.

3. Again like the Commissioner, Grant made no reference to the 1962 proposed amendments to the installment sale regulations. Apparently unaware that the ¶2(b)(2) definition of non-traditional installment plans was added

in 1963 to fill the 1962 proposed regulations' gap between ¶2(b)(1) traditional installment sales and ¶2(d)(1) defined "revolving credit plan" sales, Grant did nothing to contradict the Commissioner's erroneous assertion that the regulations contemplate only two categories, traditional installment plans and revolving credit plans.

4. Grant did not call the Court's attention to Rev. Rul. 71-595.

While Grant's acquiescence in the Commissioner's formulation may have been explicable in that Grant was defending a "traditional installment plan" victory below, it resulted in a circumstance at the least extraordinary and perhaps unique. Both litigants inadvertently had cooperated to mislead this Court into believing that the regulations contemplate only two categories of installment sales: traditional plan sales under ¶2(b)(1) and revolving credit plan sales under ¶2(b)(2).<sup>46/</sup> As the case was presented for appellate decision, both parties were telling the Court the same thing: If you find that the Grant Plan did not qualify as a ¶2(b)(1) traditional installment plan and instead find the Grant Plan a ¶2(b)(2) non-traditional installment plan, you will have concluded that the Grant Plan is a "revolving credit plan."

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<sup>46/</sup> In the prior proceeding before this Court the Commissioner filed a reply brief. It did not add materially to the contentions made by the Commissioner in his original brief.

Thus, deprived by the parties of any reference to the governing ¶2(d)(1) definition of a "revolving credit plan" and deflected by the parties' position from undertaking independent research and analysis, this Court understandably but erroneously stated as a conclusion that the Grant Plan was a "revolving credit plan."

C. The Tax Court on Remand

On remand, Grant sought to introduce evidence, derived through the use of sampling procedures and other statistical methods, to prove<sup>47/</sup> that 80% to 90% or more of sales under the Grant Plan qualified for installment treatment. J. A. 76. Believing itself foreclosed by this Court's first opinion, the Tax Court, although clearly sympathetic to Grant's request, did not allow Grant to submit its evidence. J.A. 58-59.

This second appeal followed.

III. THIS CASE SHOULD BE REMANDED TO THE TAX COURT TO ENABLE THE TRUSTEE TO DEMONSTRATE (1) THE GRANT PLAN WAS NOT A ¶2(d)(1) DEFINED REVOLVING CREDIT PLAN AND (2) THE PERCENTAGE OF PLAN SALES QUALIFYING FOR INSTALLMENT TREATMENT UNDER ¶2(b)(2) AND ¶2(c).

A dealer maintaining a ¶2(b)(2) non-traditional installment plan must demonstrate the percentage of plan sales that qualifies for tax deferred installment treatment.

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<sup>47/</sup> A method of statistical proof meets the "accurate computation" requirement of ¶2(c) of the regulations.

If the non-traditional plan is a ¶2(d)(1) defined "revolving credit plan," that demonstration must be made pursuant to the special, technical rules of proof set forth in ¶2(d)(2) and (3). If the non-traditional plan is not a ¶2(d)(1) defined "revolving credit plan," the dealer may prove the qualifying percentage of sales using any reasonable method that permits the accurate computation required by ¶2(c).

The Grant Plan was a ¶2(b)(2) non-traditional installment plan. To qualify sales under the plan for tax deferred installment treatment, the Trustee (as Grant's successor) must either (1) show that the Grant Plan was a ¶2(d)(1) defined "revolving credit plan" and offer proof in accordance with the special rules of ¶2(d)(2) and (3); or (2) show that the Grant Plan was not a ¶2(d)(1) defined "revolving credit plan," and offer proof of qualifying sales by a method of accurate computation consistent with ¶2(c).

It is the position of the Trustee that the Grant Plan was not a "revolving credit plan" as that term is defined in ¶2(d)(1).

Determining whether or not the Grant Plan was a ¶2(d)(1) defined "revolving credit plan" requires measurement of the terms and operation of the Grant Plan against the components of the ¶2(d)(1) definition. The Tax Court to date has not undertaken that measurement. It did not do so when the case was first before it because it had appraised Grant's Plan a ¶2(b)(1) traditional installment

plan. It did not do so on remand because it believed this Court's opinion had foreclosed all issues. The Trustee seeks reversal of the Tax Court determination (J.A. 58-59, 64) and remand with instruction that (1) the measurement be taken and, (2) consequent on that determination, the percentage of qualifying installment sales be established.

A. Components of the ¶2(d)(1) Definition.

The regulations, ¶2(d)(1) together with the auxiliary provisions of ¶2(d)(6), define a "revolving credit plan" as a plan or arrangement "under which the customer agrees to pay each 'billing-month' -- that period of time for which a periodic<sup>48/</sup> statement of charges and credits is rendered to a customer<sup>49/</sup> -- a part of the outstanding balance of his account." "Charges" is defined in ¶2(d)(6)(ii): "The term 'charges' includes sales of services and property as well as finance or service charges."

Thus, to constitute a "revolving credit plan" under the regulations' definition, a deferred payment arrangement must incorporate all of the following features.

First, a recurrent ("periodic") time period ("billing-month"), which normally is but need not be a 30-day month, for which customer account computations are made

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<sup>48/</sup> "Periodic" means "recurring at intervals of time; occurring or appearing at regular intervals." See p.29 n.30 and p.30 n.31, supra.

<sup>49/</sup> This definition of "billing-month" appears in ¶2(d)(6)(iii).

and a statement is rendered to the customer by the dealer.

Second, the periodic billing-month statement will reflect both charges and credits. So long as the account is active and the customer performs in accordance with his agreement, each periodic statement will always reflect new charges and new credits. Charges because, so long as the account remains active and carries an unpaid balance, there will be a finance charge (as well as a charge for any merchandise purchased during the billing-month). Credits because the customer will have made a payment to the dealer during the billing-month.

Third, the customer must agree to pay each billing-month a part of the outstanding balance of his account.

These definitional requirements mirror commercial reality. Under a revolving credit plan the customer's account balance is subject to recurrent upward adjustment. Monthly finance charges are unavoidable so long as the account carries an unpaid balance, and merchandise charges are as frequent as the customer chooses to incur them. Because the unpaid account balance shifts both upward and downward, a customer not possessed of extraordinary mathematical gifts is not able to compute his monthly payment obligation,<sup>50/</sup> the number of future monthly payments he must

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<sup>50/</sup> The terms of a revolving credit plan may require the payment of a specified percent of the balance of the customer's account as of the end of the billing month for which the statement is rendered. See Regulations, §1.453-2(d)(3)(i) Example (2).

make,<sup>51/</sup> or both. It is essential that the dealer, each billing-month, undertake the necessary computations and render a confirming statement to the customer.

B. The Regulations' ¶2(d)(1) Definition of a Revolving Credit Plan does not Describe the Grant Plan.

Augmenting the present record with additional evidence as needed, on remand the Trustee in showing that the Grant Plan was not a ¶2(d)(1) defined "revolving credit plan" will direct the attention of the Tax Court to the following considerations, among others.

1. Absence of Charges

Under the regulations, the contemplation of periodic additional charges to the customer's account is an element of the "revolving credit plan" definition. Inevitably, monthly finance charges. If the customer elects to make additional purchases, merchandise charges as well.

The contemplation of periodic additional charges was not a feature of the Grant Plan. The customer's total payment obligation, established on day-1 when he acquired a book of coupons, aggregated the redemption value of the coupons plus the total finance charge. Whether merchandise purchases (coupon redemptions) were made by the customer immediately or later, at one time or from time to time, there were no "charges" to the customer's account. Under the Grant Plan the customer was obligated to pay, each

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<sup>51/</sup> The terms of a revolving credit plan may require monthly payment by the customer of a specified dollar amount. See Regulations, §1.453-2(d)(3)(i) Example (1).

month, a fixed part of his initial indebtedness until that debt was paid in full.

2. Absence of Periodic Statements

Under the regulations the dealer's rendering to the customer a periodic statement of charges and credits is an element of the "revolving credit plan" definition. Because monthly charges and monthly credits adjust the customer's account balance up and down, the dealer must render a monthly statement to the customer. Without it, the customer cannot determine the amount and duration of his monthly payment obligation.

Under the Grant Plan the customer's monthly payment obligation was fixed at the inception. Because the Grant Plan did not contemplate periodic charges, upward adjustment of the customer's indebtedness was not a feature of the Plan. Thus, sound commercial practice did not mandate rendering periodic statements to Grant's customers.

On remand to the Tax Court, the Trustee will introduce evidence to show that under the Grant Plan, Grant neither was obliged to nor did it in fact render periodic statements to customers. Grant rendered to its Plan customers no statements at all. Instead at the inception of the arrangement when the customer acquired his book of coupons, he was informed of the amount to be paid each month and the number of payment months. Thereafter, the customer either personally delivered or mailed to the issuing Grant store the required monthly payment.

3. The Regulations' Special Proof Rules do not Fit the Grant Plan.

The ¶2(d)(2) and (3) proof rules, exclusively applicable to a ¶2(d)(1) defined "revolving credit plan," are special and complex. The proof rules are special and complex in significant part because they were designed to fit a "revolving" account, an account subject to periodic increase to reflect additional "charges."

The "revolving credit plan" proof rules do not "fit" the Grant Plan. They are more complex and burdensome than Grant's "no charges" Plan required.

Grant did not regularly maintain a record of coupon redemptions (sales) by individual customer account since it was unnecessary to do so in view of the mechanics of the Grant Plan. Development of data on a regular basis designed to meet the ¶2(d)(2) and (3) proof rules would have been extremely burdensome: The cost to Grant would have been enormous and the business value of the data nil.

But, as the Trustee will demonstrate on remand to the Tax Court, the data regularly maintained by Grant in connection with its "no charges" Plan does enable Grant to meet the ¶2(c) accurate computation requirement for demonstrating the percentage of Plan sales in fact paid for in two or more installments and thus entitled to installment

treatment. <sup>52/</sup>

This is all that the tax law requires. The tax law does not require that a dealer incur great and useless expense to meet special, complex rules of proof, rules exclusively applicable to revolving credit plans, when the dealer's non-traditional installment plan was not a revolving credit plan at all.

IV. IN THE INTEREST OF JUSTICE THIS COURT SHOULD EXERCISE ITS UNQUESTIONED AUTHORITY TO CONSIDER THE PROPER ANALYSIS OF THE CONTROLLING TAX REGULATION.

This Court, in the first appeal, based on an incorrect legal premise presented by both parties, concluded that the Grant Plan was a revolving credit plan. The Trustee recognizes that in the proceedings prior to this appeal (and prior to Grant's adjudication as a bankrupt) former counsel to Grant failed to present the analysis of the controlling tax regulation advanced here.

Normally, failure by a litigant to raise a point of law below deters consideration of that point de novo on

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<sup>52/</sup> On remand the Trustee will introduce as documentary evidence a special study of the rate of actual coupon redemptions (merchandise sales), never considered by the Tax Court in prior proceedings, that was conducted by Grant pursuant to statistical parameters established by its independent public accountants, Ernst & Ernst. Using this study and other data regularly maintained by Grant, and by application of acceptable sampling and statistical techniques, the Trustee will develop and submit an accurate computation of the percentage of sales under the Grant Plan that were in fact paid for in two or more payments and qualified for installment treatment.

appeal. Similarly, the "law of the case" rule, on standard, nonprecedential questions such as sufficiency of evidence, bars reconsideration of an issue previously decided in the same litigation. But this is not the run-of-the-mine case.

Rather, the situation here presented fits squarely within well established doctrine that efficiency-directed rules such as "law of the case" are not to be applied to perpetuate an incorrect rule of law or work manifest injustice. See generally Vestal, Law of the Case: Single-Suit Preclusion, 1967 Utah L. Rev. 1. At stake are more than \$9 million in tax liability<sup>53/</sup> already collected for the years now before the Court, some \$84 million in tax liability asserted for subsequent years, and the interests of well over ten thousand public and commercial creditors of the now bankrupt Grant.

In the case at bar every concerned party -- the Tax Court (twice), this Court, the Commissioner of Internal Revenue, Grant and its former counsel -- throughout the prior course of this litigation proceeded on the basis of an incorrect legal premise. To preserve that incorrect legal premise would work manifest injustice.

A. The History of this Litigation.

Initially, the Tax Court held the Grant Plan a ¶2(b)(1) traditional installment plan, and awarded Grant tax deferral on 100% of Plan sales. J.A. 6-41. In the first appeal Grant defended that victory. The Commissioner

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<sup>53/</sup> The term tax liability is used herein inclusive of related interest.

argued the negative. Both parties proceeded on the incorrect legal premise that if an installment plan is not "traditional" under ¶2(b)(1), it is a "revolving credit plan" under ¶2(b)(2) of the tax regulations. Finding the Grant Plan not a traditional plan, this Court followed the parties' lead, concluded the Grant Plan was a revolving credit plan, and denied to Grant any installment method benefit. J.A. 42-52. On remand the Tax Court, believing this Court's opinion to have foreclosed all issues, refused to allow Grant to demonstrate that a percentage of its Plan sales qualified for installment (tax deferred) treatment. J.A. 58-59, 63, 64. Grant brought this appeal. J.A. 66.

Thereafter, on April 13, 1976, Grant was adjudged a bankrupt. The Trustee was substituted for Grant and undertook the prosecution of this appeal.

B. Change in the Nature of the Controversy.

Prior to the bankruptcy of Grant, the essential issue in this litigation was whether Grant owed interest to the Internal Revenue Service. During the tax years in issue before the Court (years ended January 31, 1964 and 1965), and for many years thereafter, Grant annually reported sizable profits. Treating a sale under the Grant Plan as income to Grant in the year of sale or in the later year of customer payment did not change the amount of federal income tax liability attracted by the sale. But taxing the sale in a year earlier than the payment year in which Grant had reported the income did result in liability to the Internal

Revenue Service for interest (at 6% per annum) on the earlier year's deficiency. Additionally, when a Plan customer failed to pay for the coupons he had acquired, Grant's resultant bad debt loss, taken in the later but still profitable year, produced for Grant a full quantum of tax recoupment.

With the bankruptcy of Grant, all this changed drastically. Huge losses attended the bankruptcy. But, under the tax law, there is a three year limitation on the bankrupt's right to carry back and apply losses to earlier tax paying years.<sup>54/</sup> And neither a bad debt loss nor a payment of interest, in a year of already excess losses, produces any tax recoupment at all.

As a result, what was a dispute between the Commissioner of Internal Revenue and a viable Grant over several million dollars of interest now has become a dispute over some \$93 million of asserted aggregate tax liability between the Commissioner and the more than ten thousand former suppliers and other public and commercial creditors of Grant.

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<sup>54/</sup> Thus, losses relating to the bankruptcy are unavailable to offset the substantial taxable income that arose when Grant was not allowed installment treatment for any of its vast amount of coupon book (Grant Plan) sales made more than three years prior to the bankruptcy loss year.

C. The History of this Litigation and  
Drastically Changed Circumstances  
Plainly Warrant this Court's Consi-  
deration of the Legal Analysis  
Presented by the Trustee on this Appeal.

Although the correct legal analysis of ¶2(b)(2), the governing tax regulation, was not presented prior to this second appeal, the Court has clear authority now to consider that correct legal analysis. All pertinent factors -- a prior erroneous view of the law indulged by both parties, a complete change of circumstances and vast increase in the amount in controversy, the adverse impact on more than ten thousand newly involved and previously unrepre-  
sented creditors, and the advent of the Trustee in bankruptcy and of new counsel -- conjoin to urge that the Court exercise its clear authority to consider the Trustee's analysis of the controlling tax regulation and remand to the Tax Court for necessary further findings.<sup>55/</sup>

1. Appellate Consideration is not  
Limited to Legal Analysis  
Presented in Lower Court Proceedings.

In the first appeal, had Grant properly analyzed the governing tax regulation it would have tendered to the Court an interpretation of the regulation controverting the Commissioner's erroneous contention as to the scope of

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<sup>55/</sup> See part III of this brief.

¶2(b)(2).<sup>56/</sup> In tax and non-tax cases alike, the Supreme Court, this Court and other courts of appeals have sanctioned far wider leeway for the introduction on appeal of a new analysis, argument or theory.<sup>57/</sup>

(a) Tax Cases

Illustrative of tax cases in which new theories have been entertained on appeal are: Hormel v. Helvering, 312 U.S. 552, 558 (1941) (Commissioner, loser below, prevailed on new argument first presented in court of appeals); Lauinger v. Commissioner, 281 F.2d 419, 422-24 (2d Cir. 1960) (taxpayer, loser below, on appeal permitted to rely on a Treasury regulation not relied on below as to an issue not presented below); Mitchell v. Commissioner, 187 F.2d 706, 707 (2d Cir. 1951) (taxpayer, loser below, on appeal permitted to raise new theory recharacterizing transaction at issue);<sup>58/</sup> MacCrae v. Commissioner, 294 F.2d 56,

<sup>56/</sup> If this matter were now before the Court on a first appeal from the Tax Court's erroneous "traditional plan" decision in favor of Grant, without doubt this Court could and would permit the Trustee to present a correct legal analysis, and would remand to the Tax Court to allow the Trustee to show that a percentage of Grant Plan sales qualified for installment treatment. Helvering v. Gowan, 302 U.S. 238, 246-47 (1937) (Commissioner, winner below, prevailed based on new theory initially raised on appeal).

<sup>57/</sup> Statutory authority for appellate disposition -- to affirm, reverse or remand -- in the interests of justice appears in 26 U.S.C. §7482(c)(1) (review of Tax Court decisions) ("as justice may require") and 28 U.S.C. §2106 (appellate review generally) ("as may be just under the circumstances").

<sup>58/</sup> In both Lauinger and Mitchell, this Court reversed and remanded to the Tax Court for further consideration in light of the newly raised contentions. 281 F.2d at 425; 187 F.2d at 707.

59-60 (9th Cir. 1961) (appellate court entertained two new theories and held for taxpayer, loser below); Jack Ammann Photogrammetric Engineers, Inc. v. Commissioner, 341 F.2d 466, 467 (5th Cir. 1965) (taxpayer, loser below, on appeal raised new legal theories and prevailed); Rogers v. Commissioner, 281 F.2d 233, 236-37 (4th Cir. 1960) (taxpayer, loser below, permitted to raise new theory on appeal recharacterizing transaction where adjudication would impact on determination of tax liability for subsequent tax years and despite taxpayer's stipulation which arguably foreclosed newly asserted grounds). See also Road Materials, Inc. v. Commissioner, 407 F.2d 1121, 1125-26 (4th Cir. 1969); Ketler v. Commissioner, 196 F.2d 822, 827-28 (7th Cir. 1952).

(b) Non-Tax Cases

In a wide variety of situations, appellate courts have entertained new analyses, arguments and theories put forward by the losing party below, as well as by appellees and even by the reviewing tribunal sua sponte. Illustrative cases in this Circuit are: North American Leisure Corp. v. A. & B. Duplicators, Ltd., 468 F.2d 695, 698-99 (2d Cir. 1972) (case remanded for trial court consideration of theory appellant had expressly abandoned below but pressed on appeal); Green v. Brown, 398 F.2d 1006, 1009-10 (2d Cir. 1968) (reliance on appeal on sections of Investment Company Act other than those raised below, case remanded for district court fresh consideration in light of new sections); Nachman Spring-Filled Corp. v. Kay Mfg. Co., 139 F.2d 781, 783 (2d Cir. 1943) (reliance on appeal on federal statute not raised

or considered below); American Legion Post No. 90 v. First Nat. Bank & Tr. Co., 113 F.2d 868, 872 (2d Cir. 1940) (reliance on appeal on federal regulation not raised or considered below led to outright reversal without remand). See also Poignant v. United States, 225 F.2d 595, 599 (2d Cir. 1955) (Frank, J., concurring); Clark v. Tibbetts, 167 F.2d 397, 403 n.6 (2d Cir. 1948); Levesque v. F.H. McGraw & Co., 165 F.2d 585, 587 (2d Cir. 1948); United States v. Haug, 150 F.2d 911, 914-15 (2d Cir. 1945); Benz v. Celeste Fur Dyeing & Dressing Corp., 136 F.2d 845, 848 and n. 7 (2d Cir. 1943).

Supreme Court precedent includes: Allen v. Board of Elections, 393 U.S. 544, 553-54 (1969) (§5 of Voting Rights Act of 1965 raised for the first time in Supreme Court, in lower court appellant had assumed only \$4 was involved); Security Mortgage Co. v. Powers, 278 U.S. 149, 159 (1928) (remand to trial court to consider contentions bankruptcy trustee first raised in Supreme Court). Cf. Estho v. Lear, 7 Pet. 130, 131 (1833) (based on information outside record, Court reversed and remanded to avoid affirming lower court decision grounded on premise newly cast in doubt).

Exemplifying relevant precedent in other Circuits is New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 24-25 (4th Cir. 1963), cert. denied, 376 U.S. 963 (1964). In the initial district court proceeding plaintiff's counsel invoked a constructive trust theory governed by a ten year statute of limitations, and stipulated non-reliance on fraud statutes attended by a three year limitation period.

The district court ruled the ten year statute applicable. The Fourth Circuit reversed, holding fraud the appropriate characterization. On remand plaintiff was awarded damages based upon the three year fraud limitation. Defendant, on second appeal, urged that plaintiff could not recover on the fraud characterization which its counsel had disclaimed by formal stipulation in the initial proceeding. The Fourth Circuit rejected this contention. 323 F.2d at 25. It ruled:

In this day, a party ought not and does not lose his right when his counsel, however formally, advances an erroneous legal theory. If, on the facts disclosed, the party is entitled to some relief, it is the duty of the court to award it.

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[W]hatever may be said of [the] merit or demerit [of plaintiff's initial contention that the action was one for a constructive trust and not for fraud] it was simply the plaintiff's notion of a legal theory which would support its recovery of all that it claimed. The fact that we refused to accept its theory, is no basis for withholding the more limited relief available on the legal theory that the court does approve, though the theory which the court was persuaded to accept had been disclaimed by the plaintiff when it sought the whole loaf.

The parallel to the case at bar is evident. Initially, Grant sought "the whole loaf," 100% installment method deferral, by urging traditional plan characterization. The Trustee now seeks "the more limited relief," a percentage of sales qualification, appropriate to a §2(b)(2) non-traditional installment plan.

See also Evans v. Triple R Welding & Oil Field Maintenance Corp., 472 F.2d 713, 716 (5th Cir. 1973) (new theory raised at oral argument on appeal led to outright reversal without remand); Brennan v. Gilles & Cotting Inc., 504 F.2d 1255, 1266 (4th Cir. 1974) (new theory raised in reply brief on appeal); K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 475 (9th Cir. 1974), Neulsen v. Sorensen, 293 F.2d 454, 462 (9th Cir. 1961), Keene Lumber Co. v. Leventhal, 165 F.2d 815, 821 (1st Cir. 1948) (new theory raised by appellate court sua sponte); Dart Drug Corporation v. Parke, Davis & Co., 344 F.2d 173, 183 (D.C. Cir. 1965) (appellant's new counsel permitted to argue new and different contentions on appeal); O'Neill v. United States, 411 F.2d 139, 143-44 (3d Cir. 1969) (inability of government to show prejudice a factor in remand to consider new matter).

In sum, well established precedent leaves no doubt that the Trustee's position is not foreclosed by Grant's failure to tender the correct legal analysis to the Tax Court.

2. Where Distortion of Substantive Law and Injustice Would Otherwise Result, the "Law of the Case" Doctrine Does Not Impede an Appellate Tribunal from Revising its Prior Decision.

The doctrine of "law of the case" expresses the reality that appellate courts normally are not called upon to depart from a ruling made on a prior appeal in the same case. The doctrine is not a limitation on the court's adjudicatory authority. Rather, it is addressed to the court's "good sense, and the court will depart from its

prior legal pronouncements when the circumstances of the case warrant." 1B Moore's Federal Practice, ¶0.404[10] at 573-74 (2d ed. 1974), quoted with approval in United States v. Fernandez, 506 F.2d 1200, 1203 (2d Cir. 1974). See also Messinger v. Anderson, 225 U.S. 436, 444 (1912).

Judge Learned Hand, in expressly overruling contrary precedent in this Circuit, summed up as follows:

[W]hen an appellate court upon a second appeal is faced with an earlier decision of its own ... [t]he second panel has unquestioned power - "jurisdiction" - to deviate from the first.... [T]here is no imperative duty to follow the earlier ruling - only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs....

Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131, 135, rehearing denied, 231 F.2d 867 (2d Cir.), petition for cert. dismissed, 352 U.S. 883 (1956). See generally Vestal, Law of the Case: Single Suit Preclusion, 1967 Utah L. Rev. 1, 10-15.

Courts have reversed or revised decisions rendered in prior appeals in the same case in a variety of circumstances less compelling than those presented here. In some instances, no new legal argument was advanced on second appeal; in others, a new legal theory was raised for the first time on remand or on second appeal; and in still others counsel on second appeal explicitly repudiated the legal theory upon which he had relied in the prior appellate proceeding.

In Johnson v. Cadillac Motor Car Co., 261 Fed. 878 (2d Cir. 1919), this Court on second appeal corrected

its own error. On first appeal, the Court had reversed a lower court judgment for plaintiff in a negligence action against an automobile manufacturer. The ground of reversal was the absence of privity of contract between plaintiff and defendant. On remand, the District Court dismissed the action relying on this Court's "no privity" ruling. On plaintiff's appeal, this Court reversed its original position. 261 Fed. 878, 882-83 (2d Cir. 1919).<sup>59/</sup> The Court held, 261 Fed. at 886, the law of the case doctrine

is not an inexorable one, and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society. [Emphasis supplied] <sup>60/</sup>

Accord, Hammond-Knowlton v. United States, 121 F.2d 192, 205 (2d Cir.), cert. denied, 314 U.S. 694 (1939) ("if our first ruling was seriously incorrect, it does not bind us.").

It bears emphasis that the case at bar involves a principle of law for future guidance. For the very same legal issue, relating to the Grant Plan in later years,

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<sup>59/</sup> In the interim, between the first and second appeals, MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916), had been decided. However, as explained recently by this Court in United States v. Fernandez, supra, 506 F.2d at 1203 n.7, the Second Circuit on the second appeal in Johnson (which pre-dated Erie R.R. v. Tompkins) was not bound to apply the intervening state rule.

<sup>60/</sup> The Court cited numerous decisions, including Missouri, Kansas & Texas Ry. Co. v. Merrill, 65 Kan. 436, 70 P. 358, 362 (1902) ("If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally.").

is at the heart of the \$84 million proof of claim filed by the Commissioner of Internal Revenue in the Grant bankruptcy proceeding in the Southern District of New York. It would be manifest injustice to permit drastic depletion of the assets of the bankrupt estate, to the detriment of the numerous creditors of the estate, through application of an erroneous legal analysis to the years here in issue and through preservation of that erroneous legal analysis for the later years that are before the bankruptcy court.

In United States v. Fullard-Leo, 156 F.2d 756 (9th Cir. 1946), aff'd, 331 U.S. 256 (1947), the Court of Appeals similarly corrected its prior error. There, the trial court had entered judgment dismissing for failure of proof an action by the United States to quiet title to Palmyra Island. On the first appeal, the judgment was reversed and remanded, one judge dissenting. On remand, after a further trial the lower court again entered judgment for the defendants.<sup>61/</sup> The United States appealed a second time. On the second appeal, the Ninth Circuit (sitting en banc) reconsidered its prior position and, this time, affirmed the lower court. In reversing its first appeal ruling and adopting the view that had been expressed by the dissenting judge in the original panel, the Ninth Circuit stated:

Notwithstanding our decision on the former appeal we have authority, if we choose to exercise it, to re-examine the several aspects of the case.

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<sup>61/</sup> The evidence from the first trial, with "[s]ome additional evidence" was considered on remand. The Court on the second appeal did not consider the factual context to be different than on the first appeal. 156 F.2d at 757.

\* \* \*

The view of the case expressed in the minority opinion on the former appeal appears to the court as presently constituted to be the just view and it is thought that it should prevail. [156 F.2d at 757].

The Court noted that neither the original trial court nor the first appellate court majority had sufficiently considered the effect of a prior decree of a local Hawaiian court. "[T]his aspect of the case was largely ignored in the briefs of counsel." Thus,

[t]he more thorough briefing of which we now have the advantage tends to confirm the view... expressed [in the dissent to the first appellate decision], that the decree should be taken as conclusive .... [156 F.2d at 759] 62/

To the same effect is Helms Bakeries v. Commissioner, 263 F.2d 642, 644 (9th Cir. 1959), an excess profits tax case. The Tax Court had declared that the taxpayer was not entitled to relief under §§722(b)(2) and 722(b)(4) of the Internal Revenue Code of 1939. On first appeal, the Ninth Circuit held it lacked jurisdiction to hear the appeal of the §722(b)(2) claim but, concluding it had jurisdiction as to denial of relief under §722(b)(4), addressed the merits, reversed and remanded.

On remand, the Tax Court again rejected the taxpayer's (b)(4) claim. On taxpayer's appeal from this ruling the Commissioner again argued lack of jurisdiction. The Court of Appeals, despite its prior ruling (in the same

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62/ The Court also reversed its prior appellate ruling relating to presumption of a grant of title to defendants.

case) that it had jurisdiction, accepted the Commissioner's argument. Dismissing taxpayer's appeal for lack of jurisdiction, the Court expressly relied on case law newly presented by the Commissioner:

We have carefully re-examined the record in this case, and have reviewed our decision on the first appeal in the light of decisions cited by counsel before and after the submission of this cause. We have reached the conclusion that we were in error in assuming jurisdiction on the first appeal.... The "law of the case" rule does not preclude us from overruling our prior decision on being convinced that our prior holding was erroneous. [Citation omitted] [263 F.2d at 644].

Like the Commissioner in Helms Bakeries, the Trustee in the case at bar is presenting on this appeal dispositive authority not previously called to the Court's attention.

United States v. Habig, 474 F.2d 57 (7th Cir.) cert. denied, 411 U.S. 972 (1973), a criminal tax evasion prosecution, involved an "about face" in the position asserted by the Government on first and second appeals. On the first appeal the Government had conceded that United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969), required a Miranda warning for the Habig defendant. Despite this concession, on the second appeal the Government sought to avoid Dickerson and asserted no Miranda warning was due Habig. The Seventh Circuit held for the Government:

The Government now contends that the decision in [Dickerson]... does not control the disposition of the issues here despite its earlier concession to the contrary. [474 F.2d at 58]

[T]he view that appeals to us, and which we adopt, merely recognizes the law of the case as one of public policy and private peace, and one to be followed generally, and departed from rarely. It is, however, not an inexorable rule, and should not be applied where the law as announced is clearly erroneous, and establishes a practice which is contrary to the best interests of society, and works a manifest injustice in the particular case. [474 F.2d at 60]

The Court found departure from "law of the case" doctrine "particularly appropriate" where the Government's "concession [on the first appeal] was improvident and led us to imply that the rule announced in Dickerson controlled this case.... [T]hat implication was erroneous."<sup>63/</sup>

In the first appeal in the case at bar, the Commissioner authored the erroneous "only two categories" analysis of the controlling Treasury regulation. Grant, arguing in support of a victory below, concentrated on upholding the Tax Court's reasoning and, in so doing, acquiesced in the Commissioner's "either/or" presentation. The Trustee, having examined carefully the controlling Treasury regulation, has determined that the Commissioner's legal analysis was wrong and Grant's acceptance of it improvident. Under Habig the appropriateness of the Trustee's presenting

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<sup>63/</sup> See Wm. G. Roe & Co. v. Armour & Co., 414 F.2d 862, 867-70, 871 n.7 (5th Cir. 1969); Hansen & Rowland, Inc. v. C.F. Lytle Co., 167 F.2d 170, 173, rehearing denied, 167 F.2d 998 (9th Cir. 1948) (new theories raised on second appeal appraised on merits); Guth v. Texas Co., 155 F.2d 563, 565-66 (7th Cir. 1946) (entirely new theory, first raised after first appeal, sustained).

on this appeal the correct legal analysis is a fortiori.<sup>64/</sup>

Particularly relevant to the circumstances presented in the case at bar is Chase v. United States, 261 Fed. 833 (8th Cir. 1919), aff'd, 256 U.S. 1 (1921), in which plaintiff alleged statutory entitlement to an allotment of land. On plaintiff's appeal from the trial court's dismissal of his complaint, the Eighth Circuit reversed, holding that plaintiff's entitlement under an 1882 statute was not eliminated by 1893 legislation relied on by the defendant (United States). On remand, the trial court again dismissed plaintiff's action, this time on the ground -- newly pleaded by defendant -- that the 1882 statute on which plaintiff relied had been repealed (by implication) in a 1912 statute.

On his second appeal, plaintiff argued: (1) the first appellate ruling, that plaintiff was entitled to relief under the 1882 statute, was "law of the case;" and (2) the Government, although apprised from the outset of the 1912 statute on which it now placed reliance, had not raised that statute in the original lower court proceeding or in the first appeal and thus should not be allowed to raise it after that appeal. Rejecting both arguments, the Court of Appeals on the basis of the 1912 statute affirmed dismissal of plaintiff's claim.

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<sup>64/</sup> Of course, the denial of Grant's petition for certiorari from this Court's prior decision does not constitute Supreme Court approval of that decision. See Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365-66 n.1, rehearing denied, 410 U.S. 975 (1973); Hammond-Knowlton v. United States, supra, 121 F.2d at 205 n.40; 1B Moore's Federal Practice, ¶0.404 [5.-1] at 473.

In holding for the Government, the Eighth Circuit noted, "this court on the former appeal ... did not consider the effect of the Act of 1912, nor was it called to the attention of the court as conclusively appears from its opinion, and the briefs of counsel." 261 Fed. at 839 (emphasis supplied). Describing the "law of the case" doctrine as a "rule of convenience," the Court reasoned that its "former decision did not preclude [it] from doing justice between the parties, if it should be convinced that its former decision was erroneous." 261 Fed. at 840.<sup>65/</sup>

After rejecting "law of the case" as a bar, the Eighth Circuit disposed of the contention that appellee was estopped from now raising the 1912 statute:

So far as the question of estoppel, is concerned, we see no merit in that contention. Whether or not the act of 1912 repealed the act of 1882 was a question of law.... To hold that, if counsel does not raise all the questions of law on the first appeal, he may not thereafter raise any new questions of law, would be a very severe rule. There may have been a change of counsel, and many other matters which caused the failure to raise all the applicable questions of law.... [261 Fed. at 840] [emphasis supplied].

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<sup>65/</sup> The Court observed that the precise question before it on second appeal (the significance of the 1912 statute) "was not considered or decided in the former appeal, and [was] therefore ... open for consideration and decision." 261 Fed. at 840. See also Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 136 (1921); United States v. Furey, 514 F.2d 1098, 1102 (2d Cir. 1975). In the case at bar, as discussed above, prior to this second appeal neither the parties nor the Court gave any consideration to the precise issues now focused for the first time: (1) the regulations contemplate a third type of installment plan, a non-traditional plan that is not a "revolving credit plan" as defined in ¶2(d)(1); (2) the Grant Plan was just such a non-traditional installment plan.

The Supreme Court affirmed. 256 U.S. 1, 9-10 (1921). Plaintiff-appellant argued that the Government, having "relied at the first trial upon the single [erroneous] proposition" that the 1893 Act repealed the 1882 statute, could not switch to a new position after the first appeal. The Supreme Court disagreed. It ruled (256 U.S. at 10):

The [finality] proposition has a relevant and conclusive application where a judgment of a former action is pleaded but limited application when urged in the same suit, [as] it expresses a practice only and useful as such, but not a limitation of power. Messenger v. Anderson, 255 U.S. 436.

Finally, in Reconstruction Finance Corp. v. Service Pipe Line Co., 206 F.2d 814, 817 (10th Cir. 1953), the Court of Appeals initially directed entry of judgment for plaintiff "as prayed for." On second appeal plaintiff objected to the trial court's computation of interest from 1952 only and not from 1946, at 6% per annum, as "prayed for" by plaintiff. The Court of Appeals acknowledged that its mandate on the first appeal had impelled the trial court to provide the full interest -- at 6% per annum -- demanded in the complaint. Nonetheless, departing from its prior mandate, the appellate court awarded interest (from 1946) at only a 4% rate:

[I]t is fair to state that the question of allowing interest on the claim was neither presented to nor considered by this court in the former appeal.... [O]ur implied inclusion of interest in the mandate was obviously without thought or consideration of its legal justification.

The question ... [is] a substantial [one] ... deserving our deliberate judgment. Yet, on the face of the mandate as it now stands, further consideration is foreclosed here as well as in the trial court. But inasmuch as the mandate is before us for interpretation and enforcement, we are at liberty to reexamine the basis on which interest was impliedly awarded. And, our prerogative to do so is conceded. [206 F.2d at 817]

See also Hansen & Rowland Inc v. C.F. Lytle Co., 167 F.2d 170, 174-75, rehearing denied, 167 F.2d 998 (9th Cir. 1948); Mullins v. De Soto Securities Co., 56 F.Supp. 907, 914 (W.D. La. 1944), aff'd sub nom. Mullins v. De Soto Bank & Trust Co., 149 F.2d 864 (5th Cir. 1945).

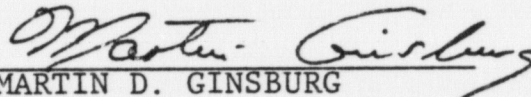
The authorities cited and discussed above demonstrate that this Court is not precluded by "law of the case" or any other doctrine from revising its prior decision to prevent unjust preservation of an erroneous legal premise ("only two categories" -- traditional and revolving credit), and the foreclosure of proof that followed from it. These authorities also confirm that the factors present in the case at bar -- a prior erroneous view of the law indulged by both parties, a complete change of circumstances and vast increase in the amount in controversy, the advent of the Trustee in bankruptcy and of new counsel -- abundantly support exercise of this Court's clear authority, in the interest of justice, to entertain on the merits the Trustee's analysis of the controlling tax regulation and remand the case

to the Tax Court for appropriate further findings of fact.<sup>66/</sup>

# CONCLUSION

For the reasons stated, the decision of the Tax Court should be reversed, and the case remanded for a hearing to determine whether or not the Grant Plan constitutes a "revolving credit plan" and, consequent upon that threshold decision, to determine the percentage of Grant Plan sales that qualified as installment sales under §1.453-2(b)(2) of the controlling tax regulations.

Respectfully submitted,

  
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September, 1976

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<sup>66/</sup> Professor Vestal, in his authoritative review and analysis of decisions in federal and state courts, concludes that "law of the case" is a doctrine of "limited scope and is contracting in application." He summarizes: "the current trend and proper place of 'law of the case' can be best understood if it is recognized that fundamentally litigants are entitled to have the law correctly applied to their lawsuits." Vestal, Law of the Case: Single-Suit Preclusion, 1967 Utah L. Rev. 1, 30, 31.

Addendum

Relevant Statute and Regulations

INTERNAL REVENUE CODE OF 1954Section 453(a)Section 453. INSTALLMENT METHOD.

## (a) DEALERS IN PERSONAL PROPERTY.--

(1) In General.--Under regulations prescribed by the secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(2) Total Contract Price.--For purposes of paragraph (1), the total contract price of all sales of personal property on the installment plan includes the amount of carrying charges or interest which is determined with respect to such sales and is added on the books of account of the seller to the established cash selling price of such property. This paragraph shall not apply with respect to sales of personal property under a revolving credit type plan or with respect to sales or other dispositions of property the income from which is, under subsection (b), returned on the basis and in the manner prescribed in paragraph (1).

PERTINENT TREASURY REGULATIONS¶1(a)(1) [Regulations, §1.453-1(a)(1)]

(a) In general. (1) Section 453 permits dealers in personal property, that is, persons who regularly sell or otherwise dispose of personal property on the installment plan, to elect to return the income from the sale or other disposition thereof on the installment method. To the extent provided in paragraph (d) of §1.453-2, sales under a revolving credit type plan will be treated as sales on the installment plan and the income from the sales so treated may be returned on the installment method. . . .

¶2(b) [Regulations, §1.453-2(b)]

(b) Definition of sale on the installment plan. The term "sale on the installment plan" means--

(1) A sale of personal property by the taxpayer under any plan for the sale or other disposition of personal property which plan, by its terms and conditions, contemplates that each sale under the plan will be paid for in two or more payments, or

(2) A sale of personal property by the taxpayer under any plan for the sale or other disposition of personal property--

(i) Which plan, by its terms and conditions, contemplates that such sale will be paid for in two or more payments, and

(ii) Which sale is in fact paid for in two or more payments.

Normally, a sale under a traditional installment plan (as described in paragraph (a)(1) of this section), meets the requirements of subparagraph (1) of this paragraph. See paragraph (d) of this section for the application of the requirements of subparagraph (2) of this paragraph to sales under revolving credit plans.

¶2(c)(1) [Regulations, §1.453-2(c)(1)]

(c) Installment income of dealers in personal property--(1) in general. The income from sales on the installment plan of a dealer, that is, a person regularly engaged in the sale of personal property on the installment plan, may be ascertained by treating as income that proportion of the total payments received in the taxable year from sales on the installment plan (such payments being allocated to the year against the sales of which they apply) which the gross profit

realized or to be realized on the total sales on the installment plan made during each year bears to the total contract price of all such sales made during that respective year. However, if the dealer demonstrates to the satisfaction of the district director that income from sales on the installment plan is clearly reflected, the income from such sales may be ascertained by treating as income that proportion of the total payments received in the taxable year from sales on the installment plan (such payments being allocated to the year against the sales of which they apply) which either (i) the gross profit realized or to be realized on the total credit sales made during each year bears to the total contract price of all credit sales during that respective year, or (ii) the gross profit realized or to be realized on all sales made during each year bears to the total contract price of all sales made during that respective year. See, however, paragraph (d)(6)(vi) of this section for rules permitting, under certain circumstances, all sales under a revolving credit plan to be considered as having been made in the taxable year. A dealer who desires to compute income by the installment method shall maintain accounting records in such a manner as to enable an accurate computation to be made by such method in accordance with the provisions of this section, section 446, and §1.446-1.

12(d)(1) [Regulations, §1.453-2(d)(1)]

(d) Revolving credit plans. (1) To the extent provided in this paragraph, sales under a revolving credit plan will be treated as sales on the installment plan. The term "revolving credit plan" includes cycle budget accounts, flexible budget accounts, continuous budget accounts, and other similar plans or arrangements for the sale of personal property under which the customer agrees to pay each billing-month (as defined in

subparagraph (6)(iii) of this paragraph) a part of the outstanding balance of his account. Sales under a revolving credit plan do not constitute sales on the installment plan merely by reason of the fact that the total debt at the end of a billing-month is paid in installments. The terms and conditions of a revolving credit plan do not contemplate that each sale under the plan will be paid for in two or more payments and thus do not meet the requirements of paragraph (b)(1) of this section. In addition, since under a revolving credit plan payments are not generally applied to liquidate any particular sale, and since the terms and conditions of such plan contemplate that account balances may be paid in full or in installments, it is generally impossible to determine that a particular sale under a revolving credit plan is to be or is in fact paid for in installments so as to meet the requirements of paragraph (b)(2) of this section. However, subparagraphs (2) and (3) of this paragraph provide rules under which a certain percentage of charges under a revolving credit plan will be treated as sales on the installment plan. For purposes of arriving at this percentage, these rules, in general, treat as sales on the installment plan those sales under a revolving credit plan (1) which are of the type which the terms and conditions of the plan contemplate will be paid for in two or more installments and (2) which are charged to accounts on which subsequent payments indicate that such sales are being paid for in two or more installments.

¶2(d)(6)(i), (ii) and (iii) [Regulations, §1.453-2(d)(6)(i)-(iii)]

(6) For purposes of this paragraph--

(i) The term "sales" includes sales of services, such as a charge for watch repair, as well as sales of property, but does not include finance or service charges.

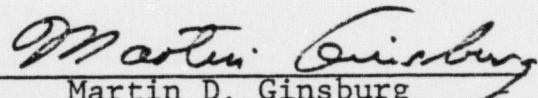
(ii) The term "charges" includes sales of services and property as well as finance or service charges.

(iii) A billing-month is that period of time for which a periodic statement of charges and credits is rendered to a customer.

CERTIFICATE OF SERVICE

I hereby certify that I have this 23<sup>rd</sup> day of  
September, 1976 served the foregoing Brief for Appellant  
on respondent-appellant<sup>89</sup> by causing copies to be mailed to:

Joseph L. Liegel, Esq.  
Tax Division  
Department of Justice  
Washington, D. C. 20530

  
Martin D. Ginsburg

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----  
CHARLES G. RODMAN, as Trustee of the  
ESTATE OF W. T. GRANT COMPANY, Bankrupt, :

Petitioner-Appellant, :

v. :

: AFFIDAVIT OF  
: SERVICE

COMMISSIONER OF INTERNAL REVENUE, :

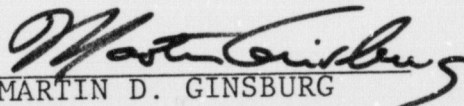
Respondent-Appellee. :

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STATE OF NEW YORK )

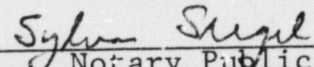
ss.:

COUNTY OF NEW YORK )

MARTIN D. GINSBURG, being duly sworn, deposes and says that he is over the age of twenty-one; that he is a member of the firm of Weil, Gotshal & Manges, the attorneys for Petitioner-Appellant; that on the 28th day of September, 1976, he served the within Brief and Joint Appendix on Joseph L. Liegel, Esq., Tax Division, Department of Justice, Washington, D.C. 20530 by depositing two (2) copies thereof securely enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States Government at 909 Third Avenue, New York, New York 10022, directed to the person herein named at its office and post office address designated by him for that purpose.

  
MARTIN D. GINSBURG

Sworn to before me this  
28th day of September, 1976

  
Notary Public

SYLVIA SIEGEL  
Notary Public, State of New York  
No. 8990010  
Qualified in Kings County  
Commission Expires March 30, 1978